United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

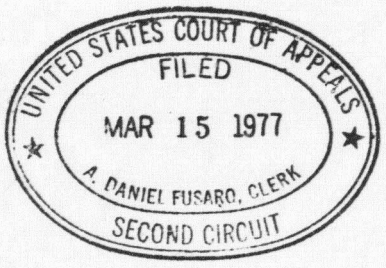
76-1581

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 76-389



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P/S

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LINDA DI STEFANO and SALLY DI STEFANO,

Defendant-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT SALLY DI STEFANO
APPENDIX

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BRIEF FOR APPELLANT SALLY DI STEFANO

PRELIMINARY STATEMENT

The Appellant, Sally Di Stefano, appeals from a Judgment of Conviction, after a trial by jury in the United States District Court for the Eastern District of New York (Platt, J.) adjudging her guilty of three counts, to violate Title 18, United States Code, Section 2113 (a) and Section 2, to violate Title 18, United States Code, Section 2113 (d) and Section 2 and one count of conspiracy. As a result of the conviction, and after a hearing on the probation report, Appellant was sentenced to a term of from 0 to 6 years.

The indictment appears on page one of Appellant's Appendix attached hereto.

STATEMENT OF FACTS

THE INDICTMENT

The Appellant, Sally Di Stefano, together with three other defendants was charged in a 3 count indictment - the first alleging that the defendants knowingly, wilfully and by force, violence and intimidation took approximately $4,846.00 in United States currency which was in the care and custody of the Chemical Bank, 1176 Portion Road, Holtsville, New York, the deposits of which were insured by the Federal Deposit Insurance Corporation, in violation of Title 18, United States Code, Section 2113 (a) and Section 2; the second count alleging that in taking such moneys from said Chemical Bank, the defendants assaulted and placed in jeopardy the lives of the employees of the Bank, as well as others present, by the use of a dangerous weapon, in violation of Title 18, United States Code, Section 2113 (d) and Section 2. Count three alleged that the defendants combined and conspired and agreed together to rob the said Chemical Bank in violation of Title 18, United States Code, Sections 2113 (a) and (d); that in furtherance of said conspiracy, the defendants committed two overt acts, on May 28, 1976, within the Eastern District of New York, by arriving in the vicinity of the Chemical Bank, 1176 Portion Road, Holtsville, New York, and on May 28, 1976 by arriving at said Bank. (Title 18, United States Code, Section 371).

This Indictment was filed in the United States District Court for the Eastern District of New York on June 11, 1976. The trial of the action commenced on the 26th day of July, 1976 and was concluded on July 30, 1976. The Appellant herein was convicted on Counts 1, 2 and 3. The defendant-appellant, Linda Di Stefano, was convicted on Counts 1 and 3. It appeared that the co-defendant, Ronald Blanda, was dead and the Court granted a motion to sever his case together with that of the co-defendant, Patrick Edwards, who testified on behalf of the United States Government against his co-defendants, Sally and Linda Di Stefano.

THE SENTENCING

On November 26, 1976, after a hearing on the probation report, the Appellant was sentenced.

The Appellant, Sally Di Stefano, appeals from her conviction on the three counts of the Indictment.

STATUTES INVOLVED

Title 18 USC, Section 2113 (a) and Section 2, states in part as follows:

Section 2113 (a)

> "Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, or whoever enters or attempts to enter any bank, or any savings and loan association, or any building used in whole or in part as a bank, or as a savings and loan association, with intent to commit in such bank, or in such savings and loan association, or part thereof so used, any felony affecting such bank or such savings and loan association shall be fined not more than $5,000 and imprisoned not more than twenty years, or both.

Title 18 USC, Section 2113 (d) and Section 2, states in part as follows:

> "Whoever, in committing or in attempting to commit any offense defined in subsections (a) and (b) of this section , assaults any person or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both."

Title 18 USC, Section 371, states in part as follows:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both ."

QUESTIONS PRESENTED

1. Whether the arrest of the Appellant and the seizure of a bag from a closet in her bedroom without an arrest or search warrant should have been suppressed.

2. Whether the accidental identification of the Appellant in the Courthouse should have been suppressed.

3. Whether the incompetence of Appellant's trial attorney deprived her of a fair trial.

4. Whether the questions raised by Appellant in Point IV should cause the case to be remanded to the District Court for a new trial.

POINT I

INTRODUCTION INTO EVIDENCE OF A BAG AND MONEYS SEIZED FROM APPELLANT DURING HER ARREST WITHOUT AN ARREST OR SEARCH WARRANT DEPRIVED APPELLANT OF A FAIR TRIAL.

Testimony by police officer Christie (T22-23) and F.B.I. agent Sweeney (T47-48) disclosed the fact that the arrest of the Appellant, SALLY DI STEFANO, in her home was made without an arrest warrant and that the officers had no search warrant.

So far as the arrest is concerned, concededly a police officer may make an arrest without an arrest warrant if probable cause exists to warrant the belief that a crime has been or was committed.

The United States Supreme Court has repeatedly held that "Under appropriate circumstances, a police officer may make an arrest without a warrant if he has 'probable cause' to believe that a crime has been or is being committed." (Wharton's Criminal Evidence, 13th Edition, Section 721).

In DRAPER v. UNITED STATES, 358 US 307, 3 L. Ed. 2d 327, 79 S. Ct. 329, information supplied by a reliable informer, the accuracy of which was verified prior to the arrest, was sufficient to establish probable cause for the arrest without a warrant. See also RECZNIK v. LORAIN, 393 US 166, 21 L. Ed. 2d 317, 89 S. Ct.342.

There are limitations however, to this general rule. In DRAPER v. UNITED STATES, supra, Justice Whittaker delivered the opinion of the Court with the cautionary instructions as emphasized by Appellant:

> "In dealing with probable cause, ... as the name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. Brinegar v. United States, supra (338 US at 175). Probable cause exists where 'the facts and circumstances within (the arresting officers') knowledge and of which they had reasonably trustworthy information. (are) sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. Carroll v. United States, 267 US 132, 162, 69 L. Ed. 543, 555, 45 S. Ct. 280, 39 ALR 790. There the Court considered information given to a narcotic agent by a 'special employee' whose information had always been found accurate and reliable."

The basis for the probable cause in the instant case was a co-defendant who committed the actual robbery and carried a shotgun (T 123), but was permitted to plead to a lesser charge (T 148), who had a strong physical dependency on drugs - heroin, methadone, marijuana, barbiturates, cocaine - (T 98), to the extent of a $5.00 to $100.00 a day habit (T 99 and 149), a man who had been promised sleeping pills by the United States Government (T 103) and finally who had been promised that the other two counts of the indictment against him would be dismissed and a strong recommendation made to the sentencing judge for a good drug rehabilitation program. (T102).

Such a source is surely not the type of "reasonably trustworthy information" that Justice Whittaker had in mind

and certainly, not the type of information always found "accurate and reliable" in Carroll v. United States, supra.

In RECZNIK v. LORAIN, supra, the Court in a Per Curiam opinion, reversed a conviction where the arrest was made on the word of an informer . As to the informer, the Court stated, "Nor did the respondent even attempt to establish that the informer was reliable."

A police officer who would arrest a suspect in his home must first identify himself and state the purpose for demanding admission. If he enters without doing so, the lawfulness of the arrest and the accompanying search will be vitiated. The announcement of identity and purpose need not be made where 'exigent circumstances' are present, such as the reasonable belief that the suspect is armed, that he may resist arrest, that he may destroy evidence, or that he may injure a victim. MILLER v. UNITED STATES, 357 US 301, 2 L. Ed. 2d 1332, 78 S. Ct. 1190. ("The requirement of prior notice of authority and purpose before forcing entry into a home is deep rooted in our heritage and should not be given grudging application.").

The testimony of Officer Christie (T 320, etc.) relating to the alleged bank bag found and moneys to the extent of some $200.00 handed over to her by the Appellant herein, revealed that after she had entered the residence of the Appellant together with the other officers and F.B.I. agents, she accompanied Appellant into another room - a rear bedroom -

and that when Sally opened her closet door to get a dress to wear, Detective Christie saw a bank bag on the floor of the closet; also that when Sally was dressing, she handed her a roll of money and stated it was her stamp money and that she wanted it back.

The bag was marked for identification and subsequently received into evidence. (T 347).

The 14th Amendment to the United States Constitution guarantees invasion by the States of the 4th Amendment's prohibition against unreasonable searches and seizures. STANFORD v. TEXAS, (1965) 379 US 476, 13 L. ed. 2d 431, 85 S. Ct. 506, reh den 380 US 926, 13 L. ed 2d 813, 85 S. Ct. 879.

It does not ordinarily preclude a search conducted as an incident to a lawful arrest even though the search may be of a residence. AGNELLO v. UNITED STATES (1925) 269 US 20, 70 L. Ed. 145, 46 S. Ct. 4, 51 ALR 409.

However, it has been held that a search may be incidental to an arrest "only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest." underlining ours. STONER v. CALIFORNIA (1964) 376 US 483, 11 L. ed 2d 856, 84 S. Ct. 889, reh den 377 US 940, 12 L. ed 2d 303, 84 S. Ct, 1330.

The Supreme Court has considered the effect of the introduction into evidence of illegally obtained evidence. In FAHEY v. CONNECTICUT, 375 US 85, 11 L. ed 2d 171, 84 S. Ct. 229, Chief Justice Warren considered the admission of

unlawfully obtained evidence and stated: p. 173

> "We find that the erroneous admission of this unconstitutionally obtained evidence at this petitioner's trial was prejudicial; therefore, the error was not harmless and the conviction must be reversed. We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there was a reasonable probability or even possibility that the evidence complained of might have contributed to the coercion."

A search of a portion of the defendant's house where it was unnecessary to go to effect the arrest of the defendant was held invalid in STATE v. ADAMS (1927) 103 W. Va. 77, 136 S.E. 703, 51 ALR 407, the Court pointing out that where there is no evidence before the search of the corpus delicto, the search after an arrest should be confined to a room or portion of the defendant;s premises where the arrest is made. See also FOWLER v. STATE (1930) 114 Tex Crim 69, 22 S.W. 2d 935.

Although it has been held that a search of a closet in a room where the defendant was arrested was not an unlawful search when it was made as an incident to a lawful arrest, (MARRON v UNITED STATES (1927) 275 US 192, 72 L. ed 231, 48 S. Ct. 74), the closet in Appellant's home was situated in a rear bedroom, away from the front of the house where the initial confrontation took place.

It is respectfully submitted that lawful arrests and searches without warrant are the exception - not the rule. The judicial process has made the entire question subject to

careful scrutiny and exceptions permitted only in instances of special or exigent circumstances.

The Supreme Court has stated:

> "In enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures, the Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution. As a general rule, it has also required the judgment of a magistrate on the probable cause issue and the issuance of a warrant before a search is made. Only in exigent circumstances will the judgment of the police as to probable cause serve as a sufficient authorization for a search. underlining ours. CHAMBERS v. MARONEY, 399 US 42 at p.51, 90 S. Ct. 1975 at p. 1981.

There has been no showing of circumstances, special, exigent, or otherwise in the case at bar.

In a similar vein, the Supreme Court had held that "searches conducted outside the judicial process without approval by judge or magistrate are per se unreasonable under the Fourth Amendment, subject only to a few specifically and well delineated exceptions." KATZ v. UNITED STATES, 389 US 347, 88 S. Ct. 507, 19 L Ed. 2d 576.

Considering the case of items in plain view, the Supreme Court of the State of New York ruled in a case involving items taken from an apartment entered by police without warrant, that a .30 calibre Winchester casing found in plain view would not be suppressed but did suppress a shotgun, shells and a photo of defendant in a ski mask which were found in a closet. PEOPLE v. PAYTON, 376 NYS 2d 779, 84 Misc. 2d 793.

As to the right of an individual to privacy, we conclude with the following:

The United States Supreme Court has repeatedly declared that the intention of the Fourth Amendment is to shield people from unwanted intrusions into their privacy. (JONES v. UNITED STATES, 357 US493, 78 S. Ct. 1253, 2 L Ed 2d 1514, (1958); KATZ v. UNITED STATES, 389 US 347, 88 S. Ct. 507, 19 L Ed 2d 576 (1967); UNITED STATES v. DIONISIO, 410 US 1, 93 S. Ct. 764, 35 L Ed 2d 67 (1973); CARDWELL v. LEWIS, 417 US 583, 94 S. Ct. 2464, 41 L Ed 2d 325 (1974).

To refer again to Katz, supra, the Court held that "what a person knowingly exposes to the public, even in his home, is not subject to constitutional safeguard, but that which he seeks to preserve as private, even in an area accessible to the public, may be so protected. Thus, wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures." (at p. 359, 88 S. Ct. at p. 515).

The arrest of Appellant without warrant, the introduction into evidence of a bag similar to a bank bag found in a closet in a rear bedroom and reference to the food stamp moneys handed to the police officer by Appellant with the sly implication that it constituted part of the hoard take from the Chemical Bank were all done under the strictures laid down by the federal and state courts of these United States and severely prejudiced the rights of Appellant herein to a fair trial.

POINT II

THE COURT'S REFUSAL TO GRANT A HEARING AND SUPPRESS THE ALLEGED ACCIDENTAL IDENTIFICATION OF APPELLANT CONSTITUTED REVERSIBLE ERROR.

The trial of defendant-appellant, Sally Di Stefano and her co-defendant-appellant, Linda Di Stefano was about half through when the Government, without notice or warning, suddenly offerred the testimony of a bank employee, Marianne Wojciehowski, to corroborate the testimony of the co-defendant and co-conspirator, Patrick Edwards, the Government's sole link between the robbery and Sally Di Stefano. The following excerpts from the trial record are significant:

(T 254-5) MR. ADLERSTEIN: I have a short application. The next witness is a bank employee who saw the person driving the car the day of the robbery, driven by a woman and this woman, this witness, was not shown a photograph by which identification was attempted to be obtained by the Government through this witness.

The witness told me that she was not wearing her glasses but she saw the person - she is near sighted - but she was able to see the woman.

Today, when Agent Sweeney took this witness downstairs to the witness room Agent Sweeney did not

know Di Stefano was outside the courtroom. The witness told Agent Sweeney, upon seeing the witness, she was, in fact, the woman she had seen driving the car.

I make an application to bring in the identification since -

THE COURT: What are you making an application for? Go ahead and do it.

MR. ADLERSTEIN: I just want to disclose the circumstances.

THE COURT: You don't have to do that.

MR. SCOTTO: In a bill of particulars, upon asking Mr. Adlerstein, he said there were no such witnesses.

THE COURT: It could have happened today.

MR. SCOTTO: Then, I'm entitled to a hearing on the identification.

THE COURT: When it's purely accidental? No.

MR. SCOTTO: My request is: 1. Preclude him based on the fact that he's bound by the bill of particulars.

THE COURT: Denied.

MR. SCOTTO: And 2. I'm entitled to a hearing prior to it.

THE COURT: Denied.

At this point, the U. S. Attorney handed 3500-3 material to defendants' counsel and proceeded with the direct examination of Marianne Wojciehowski, the bank employee referred to:

The lady testified that she was employed by the Chemical Bank as a teller, working at times in the drive-in window at the Bank. That on May 28, 1976, she was working at the window and saw a big car pulled in front of the window going in the opposite direction and there was a woman driving abd a man came out of the passenger side. She continued to wait on a customer and heard "Everybody on the floor; this is a hold-up" at which point she ducked down and saw nothing else. She then testified as follows:

(T 259-261)

Q As you look around in the courtroom, do you observe anyone in the courtroom you see today as anyone you saw in the car that day?

MR. SCOTTO: Objection, your Honor, I ask to approach the bench.

THE COURT: We've been over it once. I ruled on it once.

A I can't be very sure it's here. I know it's a girl. She had medium blonde hair, kind of curly.

Q Does anyone in the courtroom bear a resemblance?

MR. SCOTTO: I object to the form of the question.

THE COURT: I'll allow it.

Are you able to identify anybody in this courtroom as anyone driving the car?

A The girl at the end (indicating).

THE COURT: Closest to me?

THE WITNESS: It looks like it might be.

THE COURT: The girl closest to me?

THE WITNESS: Yes.

Q Are you near sighted?

A Yes.

Q Were you wearing your glasses when you observed that person in the car?

A No.

And subsequently:

THE COURT: Have you seen this lady between that day and this?

THE WITNESS: No.

THE COURT: Did you see that lady a moment ago before you identified her?

THE WITNESS: That day.

THE COURT: Did you see her anytime prior to this moment?

THE WITNESS: In the lobby.

THE COURT: When?

THE WITNESS: In the hallway when we first came in.

THE COURT: When? In the morning?

THE WITNESS: Yes. She was sitting on the floor.

CROSS-EXAMINATION BY MR. SCOTTO:

Q Ma'am, is it Mrs. Wojciehowski?

A Yes.

Q Mrs. Wojciehowski, on the day in question - withdraw that - What is your eyesight without glasses?

A I don't even know.

Q Is it very bad?

A I don't consider it very bad. It's blurry.

Q Am I blurry?

A Yes.

Q And you say on the day in question, a car drove in and what color did you say the car was?

A It was a very light color. I can't be sure. It happened so fast. I know it was a very light color car.

Q It happened very quickly?

A Right.

Q Would you say that the whole view you had of her was maybe one secnnd?

A A few seconds.

Q Two seconds?

A Yes.

(T 263-4)

A There were two people.

Q But you're not sure who they are?

A All I know is there was a woman ard a man.

Q That's all you know that there was a woman and a man in there?

A Right.

Q You told Mr. Adlerstein you didn't have your glasses on?

A Yes.

Q And you are near sighted?

A Yes.

Q Did you ever look at photographs at all of any men or women there?

A Did I ever look at photographs?

Q Yes. Photographs of men and women?

A Yes.

Q And you didn't pick anybody out?

MR. ADLERSTEIN: Your Honor, I think the question is vague.

MR. SCOTTO: I'm sorry.

Q Did the Agent show you photographs of men or women?

A No.

Q Is it because you told him you didn't know who it was, you couldn't pick out anybody? Is that correct?

A He never asked me to.

Q Did you tell them that you couldn't identify the person, you didn't know who they were but you knew

it was a man and a woman?

A Yes.

Q That's what you told them?

A. I didn't tell them anything. I just described what I saw, what she looked like to me.

Q She looked like a woman? That's what you told them; is that correct?

A I described her hair. She had medium length hair.

Q Did you tell them you couldn't pick out her face?

A Yes. I wasn't sure of the face.

Q You never saw a line etching or anything of that type?

A No.

Q But you did see someone outside in the hall that may be the person?

A Right.

Q You're not sure at all?

A Right.

In the light of many judicial opinions approving in-court identification only if it is shown that the witness was capable of making such identification when there was sufficient opportunity for observation at the time of the original confrontation, the Government in the case at bar has presented a witness, Marianne Wojciehowski, with the following credentials:

1. She was near-sighted and was not wearing glasses.

2. She was working at a drive-in window at the Bank - the car with the man and woman pulled in front of the window on the opposite side.

3. When asked if she could identify anybody in the courtroom as anyone driving the car, she responded that the "girl at the end" looked like it might be the one.

4. She admitted telling the F B I Agent that she couldn't identify the woman driver but knew it was a man and woman in the car.

5. She stated that she could describe the woman's hair but not her face.

6. Her entire view of the woman lasted 2 seconds.

Appellant should first emphasize the fact that the Government's bill of particulars contained no mention of this witness' possible identification nor was it contained in any of the 3500 material tendered to defense counsel prior to the trial and the actual testimony of the witness. In view thereof the testimony of this witness was received over the strenuous objection of defense counsel.

(T 255)

MR. SCOTTO: My request is: 1. Preclude him based on the fact that he's bound by the bill of particulars.

(T 256)

MR. ADLERSTEIN: Let the record show that I am

handing Exhibit 3500-3 to defense counse.

In addition, defense counsel's request for a hearing to determine the propriety of the proposed identification was denied by the Court.

(T 255)

MR. SCOTTO: And 2. I'm entitled to a hearing prior to it.

THE COURT: Denied.

A Federal Court has occasion to consider a similar question of a hearing outside the presence of the jury in U. S. ex rel. Raggazini v. Brierley, 321 F. Supp. 440 (1970) and held that "The refusal of the state trial judge to conduct a hearing outside the presence of the jury with respect to the admissibility of the proposed in-court identification by the prosecutrix and his subsequent rulings precluding defense counsel from cross-examining the prosecutrix with regard to her pretrial confrontations with the relator effectively denied relator a fundamentally fair trial."

The District Court W. Dist. Pa. also held that not merely a lineup but any pretrial identification must be scrutinized for its fairness and particularly, the fact that pretrial confrontation is unintentionally unfair or <u>even accidental</u> in its occurrence does not render it immune from constitutional infirmity.

Federal courts have laid down the doctrine that there must have been sufficient independent sources for the

in-court identification to render it admissible. In considering the question of whether there has been sufficient independent source, the witness' opportunity for observation must be considered.

In LONG v. UNITED STATES 424 F. 2d 799, 137 US App. D. C. 311, the Court heldthat the requirements of showing in-court identifications are based upon observations of suspect other than lineup identification is satisfied if it is shown that prior to tainted confrontation, the witness was capable of making spontaneous identification of suspect based upon his observations at the time of the offense. In this case, the Court decided that where the witness' only other encounter with defendant was on day of robbery when he observed robber during chase and never closer than 20 feet, witness' in-court identification had no source independent of the confrontation. However, in view of other evidence, permitting witness to testify was not reversible error. (This factor is lacking in the case at bar).

The same court in UNITED STATES v. SKEENS, 494 F. 2d 1050, 161 US App. D. C. 131 also held that under the law applicable to the case, identification was admissible if factors surrounding it indicated that it was reliable.

In UNITED STATES v. RAMIREZ, 482 F. 2d 807 (1973) the Court held: p. 806, that "The factors utilized in evaluating the circumstances surrounding an identification were set out in Parker v. Swenson, 332 F. Supp. 1225 (E.D. Mo.

1971), and approved in Baxter, supra. Thefirst is the length of time and the conditions under which a witness was able to observe the perpetrator during the crime. The robbery occurred in a well-lighted bar and the robbers did not attempt to disguise themselves. Sasser was personally ordered to accompany one of the robbers to the safe. The robbers were in the bar ten to fifteen minutes. The chances for misidentification were minimal."

Again, one must necessarily compare the factors in the above case with the factors in the case at bar. Surely, one cannot claim that the chances for misidentification in appellant's case were minimal.

In UNITED STATES v. HINKLE, 448 F. 2d 1157 (1971) the Court of Appeals, D.C. permitted an owner of a robbed store to make an in-court identification of defendant as the robber only when he indicated that he had watched the robber for 3 to 4 minutes in a well-lighted store. Again one should consider this opinion and the factors involved against the 2 second peek by our witness.

The District Court Ill. in UNITED STATES ex rel. ORTIZ v. SIELAFF, 404 F. Supp. 268 (1975) held that the pre-trial identification of the defendant was not weak or vague where the robbery victim had opportunity to observe robber at close range for approximately one and one-half minutes on a bright day, victim identified accused as robber from 500 photographs some five days later and the victim later iden-

tified accused from 15 photographs even though he wore a beard in that photograph and the robber was clean-shaven.

In UNITED STATES V. HAMILTON, 469 F. 2d 880, the Court of Appeals, Ninth Circuit, considered a case where the witness identified the defendant through a window in the courtroom door. She later repeated the identification from the witness stand. The Court stated: "It might well be argued that the deeply-rooted practice of allowing witnesses to identify the defendant in open court is no less a suggestive show-up than those condemned by Stovall and Foster. But we decline to take the giant step of holding in-court identifications inadmissible. It is sufficient safeguard that the accused be allowed to question the weight to be given the in-court identification considering the length of time the witness saw the perpetrator of the crime, the elapsed time between the act and the trial, and the fact that the witness had made no other identification of the defendant. UNDERLINING OURS.

In the light of the standards laid down in the cases cited supra and the factors existing in the case at bar, one must necessarily conclude that such standards were not met here, the in-court identification had no sufficiently independent source and should have been suppressed. The fact that it was not, unduly prejudiced the Appellant herein and constituted reversible error.

POINT III

APPELLANT WAS DENIED A FAIR TRIAL DUE TO INADEQUATE REPRESENTATION OF ASSIGNED COUNSEL.

Appellant voiced her dissatisfaction with her assigned counsel during and after trial in a letter addressed to the trial judge, Hon. Thomas J. C. Platt. We quote:

> "This letter constitutes a request for the assignment of a new lawyer for the purpose of an appeal of my conviction for robbery, armed robbery and conspiracy on July 30, 1976.
>
> The reasons for this request are both general and specific. Generally speaking, my lawyer and I had frequent disagreements about the conduct of my defense. These disagreements, specifically, were of the following nature:
>
> 1. The first time that I met him he stated that he felt uncomfortable practicing in front of Your Honor, and he refused to take my civil suit on brutality and negligence for the treatment of my child during my arrest.
>
> 2. He refused, to the best of my knowledge, to accede to my request for an adjournment of the trial on July 26, 1976. My reasons for wanting an adjournment at that time were as follows: There had been no time to prepare my defense, call my witnesses, or make other necessary preparations because I had been in St. Charles Hospital in Port Jefferson, New York for ten days prior to the beginning of the trial. During the time of my hospitalization, I was under constant medication, both with antibiotics and pain-killers, and as a result, I was not in a good physical condition when the trial began. In addition, the murder of my co-defendant, Ronald Blanda, had left me in a state of emotional confusion, which contributed to an inability to testify in my own behalf.
>
> The other reasons for this request are centered around the actual conduct of my defense, both before and during trial. There are as follows:

1. I previously implied that I felt it incumbent upon me to take some matters of my own defense into my own hands. The reason for this is that my current lawyer, Rafael Scotto, did not fulfill his duties on the case. Specifically, he did not (a) subpoena enough witnesses with enough time to meet eith them to prepare a thorough case for my defense. For example, he did not call a witness who could have corroborated my statement about the ownership of a bank bag; (b) he did not fulfill my request for a bill of particulars, which I felt I needed in order to understand the specific charges against me; and (c) he did not challenge evidence brought me that, to the best of my knowledge, was obtained in violation of my Fourth Amendment rights; (d) During the trial he repeatedly answered my questions concerning points of law with the statement that he was not sure of the answer because he did not know federal law. I believe that this, by itself, constitutes grounds for a new lawyer, more versed in federal procedures, to handle my appeal.

In addition, Mr. Scotto has not taken any action to point out the incorrect information in a probation report which may affect my sentence; he has not made any effort to document favorable information about my current situation which would be relevant at the time of my sentence."

In a conference with her counsel assigned to prosecute this appeal, appellant voiced these additional grievances against her trial counsel: She felt that his summation was poor and helped erase any doubt in the jury's mind regarding her guilt. He made no preparation for the sentencing hearing - never attempted to obtain character references, Doctor's reports, etc. Generally, Appellant feels that her attorney was thoroughly and grossly incompetent and would like to base her appeal on such gross incompetence.

It has been held that:

"The inadequacy of the defense of a person charged with a crime, due to incompetency of counsel, may be such as to render his conviction a violation of

the Fourteenth Amendment to the United States Constitution." LUNCE v. OVERLADE, 244 F. 2d 108, 74 ALR 2d 1384.

In JONES v. HUFF, (1945) 8 App. D.C. 254, 152 F. 2d 214, the court held that if defendant's employed attorney failed to call witnesses who would have established defendant's innocence, and failed in several other important matters as well, these facts, if true, would establish that defendant did not have a fair trial.

The failure to call witnesses, to produce witnesses and properly prepare for the trial of appellant and counsel's admitted unfamiliarity with federal rules and law as stated by appellant herein have deprived her of a fair trial. Such deprivation merits reversal.

POINT IV

ADDITIONAL POINTS ON APPEAL RAISED PERSONALLY BY APPELLANT HEREIN.

In the course of correspondence and conference with counsel assigned to prosecute this appeal, appellant has raised other questions which she feels constitute grounds for appeal. They are set forth herein without comment:

She feels that the Probation Report should not have been accepted; that the trial judge acted prejudicially in accepting statements in the report dealing with an alleged altercation that took place in the doctor's office who wrote parts of the report. Also, that this Doctor did not appear to testify, his assistant testified.

She feels that the charge to the jury was prejudicial. The judge charged that the jury could convict based on circumstantial evidence.

Appellant feels that the circumstances surrounding the death of Ronald Blanda should be looked into. He had expressed fear that he would be murdered in jail and two days before his death, told his and appellant's mother that he would testify in her behalf.

Appellant feels that her sentence was unduly harsh as compared to the sentence of her sister and co-defendant, Linda Di Stefano.

Appellant insists that she was severely abused and bruised at the time of her arrest.

POINT V

THE APPELLANT, SALLY DI STEFANO, ADOPTS AND URGES EACH POINT RAISED BY APPELLANT, LINDA DI STEFANO, WHICH IS NOT INCONSISTENT WITH THE POSITION TAKEN BY APPELLANT HEREIN.

CONCLUSION

It is respectfully submitted that the Appellant's Judgment of Conviction should be reversed and the Indictment dismissed; or in the alternative, the case should be remanded to the District Court for a new trial.

Respectfully Submitted,

IRVING ENGEL
Attorney for Defendant-Appellant,
SALLY DI STEFANO.

APPENDIX

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

- X

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LINDA DI STEFANO and SALLY DI STEFANO,

Defendant-Appellants.

- X

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK.

This is an appeal by Sally Di Stefano from a Judgment of Conviction after trial by jury adjudging her guilty of all three counts of the Indictment against her.

The Court below rendered no opinions in the case.

THE INDICTMENT

COUNT ONE

On or about the 28th day of May, 1976, within the Eastern District of New York, the defendants PATRICK J. EDWARDS, RONALD J. BLANDA, SALLY DI STEFANO and LINDA DI STEFANO knowingly and wilfully, by force, violence, and intimidation, did take from the person and presence of employees of the Chemical Bank, 1176 Portion Road, Holtsville, New York, approximately Four Thousand Eight Hundred Forty Six Dollars ($4,846.00), in United States currency, which money was in the care, custody, control, management and

possession of the said Chemical Bank, the deposits of which bank were then and there insured by the Federal Deposit Insurance Corporation. (Title 18, United States Code, Section 2113 (a) and Section 2).

COUNT TWO

On or about the 28th day of May, 1976, within the Eastern District of New York, the defendants PATRICK J, EDWARDS, RONALD J. BLANDA, SALLY DI STEFANO and LINDA DI STEFANO, knowingly and wilfully, by force, violence and intimidation, did take from the person and presence of employees of the Chemical Bank, 1176 Portion Road, Holtsville, New York, approximately Four Thousand Eight Hundred Forty Six Dollars ($4,846.00) in United States currency, which money was in the care, custody, control, management and possession of the said Chemical Bank, the deposits of which bank were then and there insured by the Federal Deposit Insurance Corporation and in commission of this act and offense the defendants PATRICK J. EDWARDS, RONALD J. BLANDA, SALLY DI STEFANO and LINDA DI STEFANO did assault and place in jeopardy the lives of the said bank employees, as well as the lives of other persons present by the use of a dangerous weapon. (Title 18, United States Code, Section 2113 (d) and Section 2.

COUNT THREE

On or about the 28th day of May, 1976, within the Eastern District of New York, the defendants PATRICJ J. EDWARDS, RONALD J. BLANDA, SALLY DI STEFANO and LINDA DI

STEFANO did combine, conspire, confederate and agree together to commit an offense against the United States in violation of Title 18, United States Code, Sections 2113 (a), 2113 (d), and 2 by conspiring to rob, by force, violence and intimidationand with a dangerous weapon, the Chemical Bank, 1176 Portion Road, Holtsville, New York, the deposits of which bank were then and there insured by the Federal Deposit Insurance Corporation.

In furtherance of the said conspiracy and in order to effectuate the purposes thereof, there were committed the following:

OVERT ACTS

1. On or about the 28th day of May, 1976, within the Eastern District of New York, the defendants PATRICK J. EDWARDS, RONALD J. BLANDA, SALLY DI STEFANO and LINDA DI STEFANO arrived in the vicinity of the Chemical Bank, 1176 Portion Road, Holtsville, New York.

2. On or about the 28th day of May, 1976, within the Eastern District of New York, the defendant LINDA DI STEFANO arrived at the Chemical Bank, 1176 Portion Road, Holtsville, New York. (Title 18, United States Code, Section 371)

A TRUE BILL

MISDEMEANOR Mis ☐ FELONY Fo ☐ | 207 District | 1 Office | Disp/Sentence | SALLEY DISTEFANO (LAST, FIRST, MIDDLE) | JUVENILE ☐ | No. of Defts * 4 | 76 | 389

U.S. TITLE/SECTION: 18-2113(a)(d), 371 and 2

OFFENSES CHARGED: Bank robbery and use of a dangerous weapon & conspiracy to do so

ORIGINAL COUNTS: 3

SUPERSEDING COUNTS:

U.S. MAG CASE NO: 76 M 1087

Denied ☐ | Amt Set | Fiduc ☐ | Pers Recog ☐ | PSA ☐

$10,000

Conditions: ☐ 10% Deposit | ☒ Surety Bonds | ☐ Collateral | ☐ 3rd Party Cust | ☐ Other

Date: 6-3-76

☐ Bail Not Made | ☐ Status Changed (See Docket)

II. KEY DATES & INTERVALS

ARREST or	INDICTMENT ☒	ARRAIGNMENT	TRIAL	SENTENCE
U.S. Custody Began:	High Risk Date:	6-18-76	Trial Set For:	Disposition of Charges:
Summons Served:	Information ☐: 6-11-76	1st Plea: II	Voir Dire ☐	☐ Convicted
First Appearance: 6-2-76	Indict. Waived ☐	Final Plea	Trial Begun: 7/26/76	☐ Acquitted
In Charging District	Superseding Indict/Info ☐	☒ NG ☐ G ☐ NOL	Trial Ended: 7/30/76	☐ Dismissed
		☐ NG ☐ G ☐ NOL		☐ On Govern't's Motion

☐ On All Charges ☐ On Lesser Offense(s) ☐ WOP: ☐ WP

CTS 1,2,+3

MAGISTRATE

	DATE	INITIAL/NO.
Search Warrant: Issued		
Search Warrant: Return		
Summons: Issued		
Summons: Served		
Arrest Warrant Issued		
COMPLAINT ▶	6-2-76	ASC/070B
OFFENSE (in Complaint)	Bank Robbery. T-18 USC Section 2113(a)(d) and (2)	

INITIAL APPEARANCE DATE ▶

PRELIMINARY EXAMINATION OR REMOVAL HEARING: Date Scheduled 6-14-76; Date Held ▶

☐ WAIVED ☐ NOT WAIVED ☒ INTERVENING INDICTMENT

Tape Number

INITIAL/NO.

OUTCOME:

☐ DISMISSED

☒ HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT

☐ HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW:

U.S. Attorney or Asst.

William Brodsky

ATTORNEYS Defense: ☐ CJA ☐ Ret. ☐ Waived ☐ Self ☐ None / Other ☐ FD ☐ CD

Raphael Scotto, Esq
300 Court Street
Brooklyn, NY

* Show last names and suffix numbers of other defendants on same indictment/information

EDWARDS 1; BLANDA 2; LINDA DISTEFANO 4

DATE	(DOCUMENT NO.) PROCEEDINGS	EXCLUDABLE DELAY (a) (b) (c) (c)
6-2-76	$10,000 secured by deed to father's house and Ored until 6/3/76 to produce deed.	
6-3-76	Deed produced. Copy of deed given to US Atty. for filing of lien.	
6-11-76	Deft. indicted - See 76 CR 389 Before NEAHER, J.	
6-18-76	Before PLATT,J.- Case called for pleading Deft & counsel present Deft waives reading of indictment and enters ap plea of not guilty Bail of $10,000.00 PRB cont'd All motions ret. 7-6-76	
6-29-76	Notice of motion filed for Bill of Particulars and Discovery etc. (ret. July 6, 1976)	
7-1-76	Before PLATT,J. - Case called. Defts :& counsel present. Motions set down for 7-6-76 at 9:30 A.M Trial set down for 7-12-76 at 9:30 A.M.	
7-12-76	Before PLATT, J - case called - trial date set for 7-19-76	
7/16/76	Notice of Luck Motion filed. Returnable 7/19/76/	
7-19-76	Before PLATT, J - case called - defts motion for an adjournment (reported and ill and unable to stand trial at this time -) granted; trial adjd to 7-26-76; Excludable Delay: Code N-7-12-76	

FORM AO-256

DATE	(DOCUMENT NO.) PROCEEDINGS (CONTINUED) PAGE TWO	(a)	(b)	(c)	(d)
7-26-76	Before PLATT, J - case called - deft & counsel present - trial resumed - defts motion for adjournment is denied - defts motion to suppress - hearing orderdd and begun -hearing concluded - motion denied - Jurors selected and sworn - trial contd to July 27, 1976.				
7/27/76	Before Platt, J. - Case called. Deft & Counsel present. Trial resumed. Deft Sally DiStefano's motion for Wade Hearing - DENIED. Wade hearing ordered & begun after defts motion to strike testimony of Marianne Wojciehowski granted. Defts motion to suppress identification - Denied. Govts motion to remand deft hearing on motion ordered and begun. Hearing concluded. Decision reserved. Trial adjd to 7/28/76 at 9:30 a.m.				
7/28/76	Before PLATT, J. - Deft Sally Di Stefano present with Counsel. Defs motion for a Judgment of Acquittal - DENIED. Motion for a mistrial - DENIED. Trial adjd to 7/29/76 at 9:30 a.m.				
7/29/76	By PLATT, J. - Order of Sustenance filed.				
7/29/76	Before PLATT, J.- Case called. Deft & Counsel present. Trial resumed. Jury retire for deliberations. The Jury excused to resume deliberations on 7/30/76 at 10:00 a.m.				
7-30-76	Before PLATT, J - case called - deft & counsel present - trial resumed - Jury resumes deliberations - Jury returns with a verdict of guilty on counts 1, 2 & 3 - sentence adjd without date - defts motion for mistrial denied with leave to renew - jury excused - bail conditions contd that deft be and remain under the supervision of the Pre Trial Services - defts motion reserved until sentencing. trial concluded.				
8/2/76	By PLATT, J.- Order os sustenace filed.				
8-26-76	Voucher for compensation of expert services filed				
10-15-76	Before PLATT,J.-Case called and adjd to 10-22-76 for sentence.				
10-22-76	Before Platt, J.- Case Called. Deft & Counsel present. Deft's motion pursuant to Rule 29 - Denied. On motion of Deft. sentence adjd. to 10-29-76 at 10:00 A.M.				
10-27-76	Before Platt, J.- Case Called. Deft's motion for hearing on probation report- Adjd. to 10-29-76 at 9:30 A.M.				
10-29-76	Before Platt, J.- Case Called. Deft. & Counsel present. Deft's motion for a Hearing on Pre-Sentence Report - Granted. Hearing set down for 11-26-76 at 9:30 A.M.				
11/26/76	Before PLATT, J. - Case called. Deft & Counsel present. Defts motion for substitution of counsel - denied. Hearing on Pre-Sentence report ordered and begun. Deft rests, Govt rests, Hearing concluded.Defts motion to strike certain statements from Pre-Sentence report - denied. Defts motion for adjournment				

RECEIPT NUMBER	C.D. NUMBER

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET U. S. vs.

6 CR 389 SALLEY DISTEFANO

76 389 3
Yr. Docket No. Def.

DATE	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE DELAY (a) (b) (c) (d)
	denied. Deft is sentenced on Count 1 for imprsionment for six (6) years pursuant to T-18:4205(b)(2), on count 2 for imprisonment for six (6) years pursuant to T-18: 4205(b)(2), and on count 3 for imprisonment for five (5) years pursuant to T-18:4205(b)(2). Such sentence of imprisonment to run concurrently with the sentences of imprisonment imposed under counts 1 and 2 of the indictment. Bail ($10,000 Surety) coninuted pending appeal. Clerk to file Notice of Appeal.	
11/26/76	Judgment & Commitment filed. Certified copies to Marshals and probation.	
11/26/76	Notice of Appeal filed.	
11/26/76	Docket entries and duplicate of Notice of Appeal mailed to the Court of Appeals.	
11/26/76	Defts financial affidavit filed.	

A TRUE COPY ATTEST
DATED 11/26 76
JAMES F. DAVEY, CLERK
BY Terri Davey

AO 257 Interval (see Section II) Start Date Ltr. Total

3/15

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
----------X

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LINDA DI STEFANO and SALLY DI STEFANO,

Defendants-Appellants

----------X

Docket No.: 76-1581
76-1582

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

RICHARD P. MORRIS, being duly sworn, deposes and says:

1) Deponent is not a party to this action, is over 18 years of age, and resides at 80-39 189th Street, Jamaica, New York.

2) On the 14th day of March, 1977 deponent served the within Appendix and Brief for Appellant, Sally Di Stefano upon the Hon. David G. Trager, attorney for the United States of America, Plaintiff-Appellee in this action at 225 Cadman Plaza East, Brooklyn, New York 11201, the address designated by said United States Attorney for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York

3) On the 14th day of March, 1977, deponent served the within Appendix and Brief for Appellant, Sally Di Stefano upon the Legal Aid Society, attorney for Linda Di Stefano, Co-Defendant, Appellant in this action at 15 Park Row, New York, New York 10038, the address designated by said attorney for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Richard P. Morris

RICHARD P. MORRIS

Sworn to before me this
14th day of March, 1977

Michael G. Wagner

NOTARY PUBLIC

MICHAEL G. WAGNER
Notary Public, State of New York
No. [illegible]
Qualified in Nassau County
Commission Expires March 30, 1978